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**From:** Hicks, Matt [Hicks.Matthew@epa.gov]  
**Sent:** 8/20/2020 7:09:53 PM  
**To:** Palmer, Leif [Palmer.Leif@epa.gov]; Ghosh, Mita [Ghosh.Mita@epa.gov]; Nagrani, Kavita [Nagrani.Kavita@epa.gov]; Creswell, Michael [Creswell.Michael@epa.gov]  
**Subject:** FW: Question on possible challenge period  
**Attachments:** ATT00001.txt

See below some questions from FDEP staff attorney Ravi Sharma about what a challenge to EPA's approval of FL's assumption might look like and my initial thoughts in blue. My thoughts are provided for our internal consideration and not necessarily to share with FDEP.

**Ex. 5 Deliberative Process (DP)**

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Ravi is hoping to brief his client on this next Wednesday, Aug 26, and would like to talk before then. I'm out of the office until August 31<sup>st</sup> starting tomorrow so Kavita and Michael will likely need to run with this.

Thanks,

Matt

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**From:** Sharma, Ravi <Ravi.Sharma@FloridaDEP.gov>  
**Sent:** Thursday, August 20, 2020 12:02 PM  
**To:** Hicks, Matt <Hicks.Matthew@epa.gov>  
**Subject:** Question on possible challenge period

Hi Matt,

We've had some questions from our client staff with regard to potential challenges for the assumption package at the federal level.

They seem especially concerned about the potential for DEP staff to be deposed etc., and what the most likely challenges to the agency action would be.

Not sure if Florida has something equivalent to our Touhy process but, if so, I suppose it's possible that FDEP could try to limit staff testimony in a challenge to EPA's approval if Florida is not a party. Florida should be able to answer this question for themselves. But I think it's possible and maybe even likely that FDEP would be named as a co-defendant in any challenge to EPA's approval.

On our launch pad sharepoint site we have a list of categories of comments we're most likely to receive from the public that we developed in order to assist the contractor that will help us process the comments. There's a lot we may receive comment on but I see the most likely challenges involving:

- ESA § 7 consultation
- 5 year permit limit/notice and review of multi-phase projects
- Public rights of challenge/intervention under FL's 404 program
- Depending on how the Idaho 402 case goes, simple negligence issue

Do you have maybe some broad strokes on what likely challenges would look like during that period? And potential timelines on how long they may go on, and the possibility of delaying assumption?

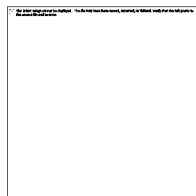
The challenge would come on our decision to approve which would be considered FAA under the APA. The challenge would likely claim that our decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Any challenge would involve a record review. APA 701(a)(2) provides an exception to the general rule of reviewability when "agency action is committed to agency discretion by law." Although we are taking the position on ESA and NHPA that our decision to approve a 404 program is discretionary, the exception under 701(a)(2) is narrow and may not apply in the case of 404(h) since courts are more likely to apply it in situations where the statute provides no meaningful standard upon which to judge the agency's exercise of discretion. The characterization of our action as discretionary is also relevant as we may get a mandatory duty challenge under CWA 505(a)(2), which is limited to non-discretionary acts or duties. Of course, challengers will point to the Silva memo and our position in the National Homebuilders case to argue that our action is in fact non-discretionary.

In terms of timing, there's a 60-day NOI period for citizen suits under CWA 505(a)(2) but I think a party can bring an APA claim as soon as we make our decision. In either case, I believe a challenger could move for a preliminary injunction which requires a clear showing of immediate irreparable injury. If granted, it could result in a lengthy delay.

Note – I'd spoken to them about the potential for preliminary injunctions, how most challenges to agency action are for alleged violations of the APA, and any effect on DEP staff would depend on the nature of the challenge itself. It seems they're wanting something a bit more defined as to what challenges are most likely to occur, what the ensuing action would look like etc.

I'm to brief them next Wednesday, 26 Aug. If you're able to provide any info on the above it'd be very much appreciated.

Thanks very much,  
Ravi



**Ravi Sharma**

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